NO. 49982-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARIN HENRY JENSEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-1-00457-3

Brief of Respondent

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2. Did the trial court act within its discretion by refusing defendant's attempt to introduce non-reputation, specific act, evidence of sobriety?

3. Did the trial court act within its discretion when it sustained an objection to the question: "Was he known as a drug user?"

4. Does appellant's failure to make an offer of proof as to a question preclude appellate review, where the answer to the question is not apparent from the context of the witness' testimony?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 9, 2016, the State filed an Amended Information charging Darin Henry Jensen, hereinafter "defendant," with one count of

unlawful possession of a controlled substance and two counts of bail jumping. CP 22-23.

On January 4, 2017, the case proceeded to trial before the Honorable Garold E. Johnson. VRP 2.[1] Following the jury trial, the jury returned guilty verdicts on all charges. CP 79-81. The court sentenced defendant to time already served (77 days) and 12 months community custody. CP 84-98. Defendant's notice of appeal was timely. *Id.*

2. FACTS

Officer Temple testified that on January 29, 2016 he arrested defendant pursuant to lawful authority. VRP 72-74. In the course of the search incident to arrest, Officer Temple found a small baggie with a crystal-like substance in it in defendant's pants' pocket. VRP 75. Officer Temple testified that he confronted the defendant about the baggie and defendant admitted that it was methamphetamine. VRP 76. The baggie contained methamphetamine.[2]

After the prosecution rested, an investigator testified about the layout of the New Hope homeless shelter in Puyallup[3] and about pictures

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[1] The citations conflict with the citations in Appellant's Brief (at 2-3). This is because appellant cites to testimony presented at the CrR 3.5 hearing, not the trial.
[2] Exhibit 3 (the baggie of methamphetamine) was admitted at VRP 76 and laboratory examination results were presented at VRP 96-98.
[3] VRP 136.

of New Hope she had taken,[4] including guidelines for storage of personal items at New Hope. VRP 137.

Cheryl Borden then testified. VRP 148-149, 158-172. On January 29, 2016, she was the executive director at the New Hope Resource Center in Puyallup. VRP 148. Ms. Borden was familiar with defendant. *Id.* She knew defendant because as one of the guests that would come into New Hope. New Hope "was a daytime drop-in so people could get out of the weather, have a safe place to be and then get connected with resources to try and help resolve their homelessness and find stable housing." *Id.*

Ms. Borden knew defendant pretty well.[5] VRP 149. She saw him on a regular basis and talked to him. *Id.* She saw him when he would come in to the New Hope Center, with the possible exception of Sundays. VRP 159. He came in about five or six times a month, then they wouldn't see him for a while. *Id.* She interacted with him one-on-one, and within a group atmosphere. *Id.* She also had "a chance to observe him interacting with other people..." *Id.*

> ...You know, people would kind of get together in groups either inside the center, but probably more outside in the parking lot, folks may be standing in a group smoking cigarettes or something, and I would stand out there and talk with folks about what's going on.

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[4] VRP 136-139,145-46.
[5] She knew him for several months. VRP 159.

Id. Ms. Borden did not know defendant's reputation at New Hope. VRP 160.[6] Defense counsel also made an offer of proof of Ms. Borden's testimony:

> He was at this New Hope facility. Ms. Borden will testify that he's had no drug use problems, and they do kick people out if they have drug uses. No other any kind of infraction. He's been very cooperative with them. And I think I should be allowed to introduce that to the jury.

RP 152.

> . . . I can explore with Ms. Borden that Mr. Jensen never had any drug use issues, never had any drug possession issues while he has been using this facility for some time.
>
> She testified she knows Mr. Jensen. She knows him for some time. She knows him well, because he has used their services for some time. So based on her contact with him at her facility which she was the director of, she can testify that at this facility she never had to in any way take action against Mr. Jensen for drug use or drug possession.

VRP 154.

Based on this factual predicate, defendant sought to elicit the following testimony (hereinafter referred to as Question One, Question and Answer Two, Question Three, and Question and Answer Four):

Question One:

Q "Did you have any conduct or behavior issues with him?" VRP 149. Objection sustained at VRP 157.

Question and Answer Two:

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[6] The question that prompted this testimony was objected to, but no motion to strike or disregard the testimony was made. VRP 160.

Q. ". . . Did you know his reputation at New Hope?" VRP 160.

A. "I don't know—I don't know about his reputation necessarily. He seemed to be—" VRP 160. Objection sustained at 161. Answer not struck.

Question Three:

Q. "Was he known as a drug user?" VRP 160. Objection sustained at VRP 160.

Question and Answer Four:

Q. "If someone has found to have used drugs in New Hope, what happens?" VRP 161.

A. "They're dismissed." VRP 161.

Q. "Was Mr. Jensen ever dismissed?" VRP 161.

A. "No." VRP 161 Objection sustained and answer struck. VRP 161.

Following the testimony of the two defense witnesses, defendant testified that Officer Temple did not find drugs in defendant's pockets. VRP 181. Defendant testified that Officer Temple confronted him about drugs found in his backpack. VRP 181-82. Defendant testified about his backpack and drugs:

Q. Did he eventually put you under arrest?

A. He placed me, yeah, in the, more or less in custody, arrest, into the vehicle after the warrant check. Then he proceeded to go through my bag.

. . .

Q. After Officer Temple put you in handcuffs he put you inside his car?

A. Yes.

Q. Prior to him putting you inside his car did he search you?

A. Yes.

Q. Did he find any drugs in your pockets?

A. No.

Q. Did he search your backpack after you were inside the car?

A. Yes.

Q. Did he find any drugs in your backpack?

A. I assume he did. He opened the door and asked me about the methamphetamine, and I stated there was some marijuana in there.

He said, I don't give an F about the marijuana. It's the charge I care about. And he kicked my bag and said, Is there any—do you have any heroin in here.

Q. Let me ask you the next question. Did he show you this bag, the bag that's inside the evidence bag?

A. He opened the door and read me my Miranda rights, and then he went and did that.

Q. Did he show this bag to you?

A. Yeah. No, he never showed me the bag at all.

Q. Did he ask you where the meth came from?

A. He asked—pertaining to the shards. He said it's the shards that I give a shit about, and kicked the bag and said, Do you have any heroin.

Q. Did he find any heroin in your backpack?

A. No.

Q. And your testimony is he didn't show you the bag while you were inside the car?

A. Never.

VRP 181-83. Defendant then testified about how he had left his bag unattended at New Hope for quite some time and there were more people at New Hope than usual. VRP 182-83. Defendant then testified:

Q. Did this meth inside this bag belong to you?

A. No.

VRP 183.

Defendant never denied knowledge of the methamphetamine that he assumed was found in his backpack.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN SUSTAINING THE OBJECTION TO QUESTION AND ANSWER TWO.

The trial court's ruling sustaining the objection to Question and Answer Two question was undoubtedly correct. The question was "Did you know his reputation at New Hope?," ***not*** "What was his reputation at New Hope?" VRP 160. The answer to the question was plainly nonresponsive, and the prosecution's objection was properly sustained. *Id.* Second: The jury was not instructed to disregard Ms. Borden's answer, so it is properly part of the record, and the defendant received the benefit of the testimony he sought (however slight). *Id.* ***State v. Swan***,

114 Wn.2d 613, 658, 790 P.2d 610 (1990). Third: The answer defendant received to his question was decidedly unhelpful to defendant, so the trial court's ruling did not result in the prejudice necessary to support a claim of error. ***Brown v. Spokane County Fire Prot. Dist. No. 1***, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Finally: Defendant makes no reference to this exchange in the argument section of his brief.

2. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT REFUSED TO ADMIT CHARACTER EVIDENCE RELEVANT TO THE DEFENSE OF UNWITTING POSSESSION BEFORE THE DEFENSE OF UNWITTING POSSESSION MANIFESTED ITSELF AT TRIAL.

"In a typical strict liability case, in which no affirmative defenses are available, character evidence is irrelevant." ***Kennewick v. Day***, 142 Wn.2d 1, 9, 11 P.3d 304 (2000). Possession of a controlled substance is a strict liability crime. *Id.* Character evidence of sobriety *can* become relevant in a drug possession case, but only when an appropriate affirmative defense is presented. *Id.* In this case, when Cheryl Borden testified, the affirmative defense of unwitting possession had not yet been raised.

At the point in time when Cheryl Borden testified, there was *no* evidence before the trial court of unwitting possession. While there was

some testimony about the New Hope facility,[7] there had been no testimony about defendant's unattended backpack, no testimony about methamphetamine in that backpack, and no testimony about defendant's supposed lack of knowledge of the supposed methamphetamine in that backpack. In short, no evidence of unwitting possession had been presented to the trial court when Ms. Borden testified.

Furthermore, at the time Ms. Borden testified, there could be no assurance that there ever would be unwitting possession testimony. As the record in this case demonstrates, defendant himself was the only possible source of unwitting possession testimony, and at the time of Ms. Borden's testimony the defendant retained the personal and unfettered right to testify or not testify. It was entirely feasible that the trial court could admit evidence of the defendant's character for sobriety and defendant could, quite properly, decline to testify. In such an event, any admitted character evidence of sobriety would have become irrelevant and a waste of time. ER 402, 403. Caution was the order of the day. In this context, the trial court expressed its sensitivity to this foundational issue:

> Of course, a foundation has to be laid for that first, and then once you get beyond that, then perhaps a question could be asked her as to his reputation.

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[7] The investigator testified about New Hope and its facility for storing items (VRP 136-39, 145-46), as did Ms. Borden (VRP 165-67).

VRP 156.

> If there is evidence that you intend to pursue – I want to give you some guidance here. If there's going to be reputation evidence, of course, foundation has to be laid. We'll take up -- if there's another objection, we'll take it up at that point. But as it stands today, as it stands at this moment, that seems like the best direction I can give you.

VRP 157-58. When defense counsel made his attempt to ask Question Three ("Was he known as a drug user?"),[8] the trial court invited defense counsel to further argue the matter outside the presence of the jury. VRP 160. Defense counsel did not accept the invitation.[9] *Id.*

In this case, the trial court's decision was especially vindicated by subsequent developments at trial. As it turned out, defendant's unwitting possession defense was based upon an alternative version of the facts based on an alternative location of the drugs. The defendant denied that drugs were found in his pockets (VRP 181), in direct contrast to the arresting officer's testimony. VRP 75.

The trial court is authorized to "exercise reasonable control over the orderly presentation of argument and evidence." ***Sanders v. State***, 169 Wn.2d 827, 851, 240 P.3d 120 (2010) (citing ER 611(a)); ER 403. *See*

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[8] VRP 160.

[9] Defense is not claiming ineffective assistance of counsel on appeal, either for failing to address the matter further or for failing to recall Borden during the defense case.

generally ***Geders v. U.S.***, 425 U.S. 80, 86-87, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976). A trial court acts well within its discretion when requires a defense to manifest itself before that defense may be bolstered.[10]

3. ALTERNATIVELY, THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT'S CHARACTER EVIDENCE OF SOBRIETY.

a. Question One and Question and Answer 4 were properly rejected by the trial court because they were improper attempts to introduce non-reputation, specific act character evidence.

Question One and Question and Answer 4 were attempts to introduce "specific act" evidence and not reputation evidence. In Question One the defendant sought to elicit testimony pertaining to "conduct or behavior issues" (VRP 149) and in Question and Answer 4, whether defendant was ever "found to have used drugs" at the New Hope facility (VRP 161). The trial court properly rejected those improper attempts to introduce improper character evidence.

Kennewick v. Day is an ER 404(a)(1) case where the defendant's attempt to introduce "reputation in the community for sobriety" was rejected by the trial court. ***Kennewick v. Day***, 142 Wn.2d 4 P.3d 304 (2000). The legal analysis in ***Kennewick v. Day*** focused on whether

[10] This is analogous to the requirement that a nexus must be shown between an alternative suspect for a crime before other suspect evidence may be admitted. *See* ***State v. Franklin***, 180 Wn. 2d 371, 373, 325 P.3d 159 (2014).

character evidence was admissible pursuant to ER 404(a)(1). The Supreme Court held that character evidence of reputation in the community for sobriety was admissible in that case because reputation for sobriety was pertinent to the affirmative defense of unwitting drug possession. ***Kennewick***, 142 Wn.2d at 15. In reaching that conclusion, the Court noted that the "evidence of a pertinent trait of character" required by ER 404(a)(1) is a *"de minimis* standard."

In Question One and Question and Answer Four in this case, the defendant sought to present "specific act" character evidence, unlike ***Kennewick v. Day***. In ***Kennewick v. Day***, "[t]he trial court excluded testimony regarding Day's reputation for sobriety from drugs and alcohol, finding this was not evidence of a 'pertinent trait of character' under ER 404(a)(1)." (emphasis added) ***Kennewick v. Day***, 142 Wn.2d at 3. This is reflected in the Court's holding:

> Day's reputation for sobriety from drugs and alcohol is "pertinent" to the charge of possession of drug paraphernalia because "intent to use" is an element of the offense. Further, Day's reputation for sobriety from drugs and alcohol is "pertinent" to the charge of simple possession because he raised the defense of unwitting possession. Day presented evidence tending to establish that the marijuana and marijuana pipe were placed in his truck while it was being repaired. Defendant's presentation of third party testimony regarding his reputation for abstention from the use of drugs was important to his defense.

Kennewick v. Day, 142 Wn.2d at 15. "Specific act" character evidence was not at issue in that case.

Kennewick v. Day and ER 404(a)(1) are the gateway to the introduction of character for sobriety evidence in this case. But, "[w]hen an accused offers evidence of a pertinent trait of character, ER 405(a) governs the allowable methods of proof." ***State v. Kelly***, 102 Wn.2d 188, 685 P.2d 564 (1984).

If the defendant established a foundation of unwitting possession, the defendant was entitled to present evidence of "reputation for sobriety from drugs and alcohol" pursuant to ER 404(a)(1) and ***Kennewick v. Day***, 142 Wn.2d at 15. That is because once ER 404(a)(1) is satisfied, the proponent is always entitled to prove the relevant character or trait by testimony as to reputation pursuant to ER 405(a).[11]

However, if a defendant seeks to prove character for sobriety by means other than reputation, the defendant is constrained by ER 405(b), which presents a much higher burden than the "*de minimis*" standard of ER 405(a):

> **(b) Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

[11] "In all cases in which evidence of character or a trait of a person is admissible, proof may be made by testimony as to reputation...." ER 405(a).

ER 405(b). The distinction between ER 405(a) and ER 405(b) was emphasized Supreme Court in ***State v. Hutchinson***, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998):

> [I]n this case, the Defendant's claim of self-defense was not dependent upon his being able to show Deputy Heffernan had a propensity toward violence. Although relevant, Deputy Heffernan's character was not an essential element of the defense, and evidence of it was properly limited to testimony regarding reputation.

State v. Hutchinson, 135 Wn.2d at 887.

> Character is an "essential element" in comparatively few cases. In criminal cases, character is rarely an essential element of the charge, claim, or defense. For character to be an essential element, character must itself determine the rights and liabilities of the parties.

(internal citations omitted) ***State v. Kelly***, 102 Wn.2d at 196-97. Character for sobriety is not an essential element of the defense of unwitting possession. If it were, we would have the absurd result of people who are not sober barred from raising the defense of unwitting drug possession.

This Court should conclude that even if unwitting possession was properly established in this case, Question One and Question and Answer Four sought to admit improper "specific act" character evidence and were properly rejected by the trial court.[12]

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[12] The trial court expressed concern about defendant's lack of proper foundation for ER 405(a) when it sustained the objection to Question One.

b. The trial court properly sustained the objection to refuse defendant's Question Three.

Defendant's lawyer asked Ms. Borden the following question: "Was he [defendant] known as a drug user?" VRP 160. The trial court sustained that objection. *Id.*

i. **Question Three is improper non-reputation testimony, and was offered without foundation.**

Question Three, "Was he known as a drug user?" begs the obvious question: Known to whom as a drug user? The answer to that question could fall into any one of three categories: (1) Known only by the witness as a drug user; (2) Known to an irrelevant community as a drug user; or (3) known to a relevant community as a drug user. Only one of those three categories could have been valid.

The proper manner of introducing evidence of reputation is well established:

> The orderly and proper way to put in evidence of this sort, after the witness has testified to acquaintanceship with the defendant not too remote in point of time, is to have the witness answer No or Yes, as the fact is, to the question, if he knows what the general reputation of the defendant is, in the community in which he resides, for the particular trait of character (naming it) that is relevant to and involved in the crime with which the defendant is charged. If the witness answers No, that ends the inquiry. If he answers Yes, then the next and final question should be, What is it, good or bad?

State v. Argentieri, 105 Wn. 7, 10, 177 P. 690 (1919) (a pre-ER case later cited with approval in ***State v. Kelly***, 102 Wn.2d at 194).

The trial court in this case acted within its discretion when it sustained the prosecutor's foundation objection. VRP 160. Defendant had an opportunity to (a) narrow the question down to a relevant community, and (b) develop evidence that his witness had knowledge of the relevant community, but he did not take that opportunity. Defendant cannot fairly claim the trial court erred by refusing to loosen the well-established foundation requirements of reputation testimony.

ii. **Alternatively, defendant has failed to preserve error as to Question Three.**

Defendant made no offer of proof as to how Ms. Borden would have answered Question Three. Defendant's failure to make an offer of proof precludes any claim of error. ER 103(a). While an offer of proof is unnecessary when the substance of the excluded evidence is apparent from the record,[13] the substance of the excluded evidence in this case is unknown. Prior to this question, Ms. Borden had testified: "I don't know—I don't know about his reputation necessarily. ..." VRP 160. This Court cannot infer from the context what the answer to Question Three would have been. ER 103(a).

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[13] ER 103(a)(2).

c. If the trial court did commit error when it excluded defendant's character evidence of sobriety, the error was harmless.

When a claimed error is a violation of an evidentiary rule, the standard of review is whether "the outcome of the trial would have been materially affected had the error not occurred." ***State v. Elliott***, 159 Wn. App. 1006 (2010). "The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole and did not affect the outcome of the trial." ***State v. Elliott***, 159 Wn. App. 1006 (2010).

In this case, it is overwhelmingly clear that the jury necessarily rejected defendant's "assumption" that the drugs at issue were found in his backpack. Officer Temple found methamphetamine in the defendant's pants pocket. VRP 75. Defendant testified that he "assumed" the drugs were found in his backpack and that someone must have placed them there at New Hope. VRP 181-83. These accounts are in contradiction and put the credibility of the two witnesses in question.

"Whether a witness has testified truthfully is entirely for the jury to determine." ***State v. Ish***, 170 Wn. 2d 189, 196, 241 P.3d 389, 393 (2010). The jury weighed the evidence and returned a guilty verdict. The jury rejected the defendant's account of what happened, and as such accepted

Officer Temple's account. "There is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." ***State v. Vassar***, 188 Wn. App. 251, 261, 352 P.3d 856, 862 (2015). Therefore, even if the character evidence was admitted it would not have affected the outcome of the case. Defendant's "assumption" that the drugs were found in his backpack, was rejected by the jury, thereby rendering useless any character evidence which relied upon that assumption.

The exclusion of defendant's character for sobriety evidence could not possibly have tainted the jury's verdict that the defendant possessed the drugs Officer Temple found in defendant's pocket (VRP 75) because defendant expressly divorced his unwitting possession defense from *those* drugs. VRP 181-83. His defense to the drugs found in his pocket was straight denial. VRP 181. Sobriety evidence was irrelevant to the jury's verdict that the defendant possessed methamphetamine in his pants pocket. ***Kennewick v. Day***, 142 Wn.2d at 9. And no reasonable jury could have convicted defendant based upon defendant's own "assumed" drugs in the backpack theory.

Further, if the jury accepted defendant's account the drugs were in his backpack, defendant's theory of how the drugs may have come to be in the backpack was not convincing. Defense presented evidence that guests

at New Hope were required to keep their backpacks in a storage area where they are labeled with the guests' names. VRP 164-65. The labels insured guests did not touch, take, or search items that did not belong to them. VRP 165, 170. The storage area has two access points, both have controlled entry and guests are only allowed access if they are escorted by a staff member. VRP 168-70. Given the controlled access of the storage area, the labels, and the requirement to be escorted, no reasonable jury would accept defendant's unwitting possession defense.

Because the overall evidence does not support, but rather undermines defendant's theory of unwitting possession, the excluded character evidence is insignificant when weighed against the evidence as a whole. If the trial court did error by excluding character evidence, the error was harmless. *See* ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (error is harmless if the evidence is of minor significance when compared to the overall weight of the evidence). Any error in this case was harmless.[14]

D. CONCLUSION.

The trial court properly refused character evidence of sobriety before evidence of unwitting possession was admitted. Alternatively, the trial court's specific act evidence rulings were within the trial court's

[14] The unwitting possession jury instructions are law of the case.

discretion. Alternatively, any error resulting from the denial of specific act evidence was harmless. The trial court should be affirmed.

DATED: September 26, 2017.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.26.17 Theresa Kal
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

September 26, 2017 - 2:50 PM

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